

No. 352

JULIA THOMPSON.

vs.

EDWARD P. LAWSON, AS DEPUTY COMMISSIONER
OF THE UNITED STATES BUREAU OF
COMPENSATION, SIXTH COMPLEMENT,
DISTRICT, ET AL.

MEMORANDUM FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

WRIT OF HABEAS CORPUS FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

vs.

Petitioner,

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER
OF THE UNITED STATES BUREAU OF EMPLOY-
EES' COMPENSATION, SIXTH COMPENSATION
DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

The respondents, Gulf Florida Terminal Company, Incorporated and American Mutual Liability Insurance Company, in their brief in opposition to the petition for writ of certiorari have sought to frame the question for this Court as though the issue presented here were one of sufficiency of evidence upon which to base findings by an administrative agency, rather than one of law.

The respondents can find no support for their position either in the decision below or in the other decisions on the

problem posed by the present petition. The Fifth Circuit in its opinion below stated that:

“This appeal presents the single question whether on the facts found by the Deputy Commissioner, Commissioner and Judge were right in rejecting plaintiffs’ claim that within the meaning of (the Act), she was the “widow” of Otis Thompson, deceased, and entitled to recover compensation as such.”

The question was resolved by the Court not by a ruling that the Deputy Commissioner’s findings were based upon sufficient evidence, but upon the prior holdings of the Fifth Circuit. They proceed, the Court declared, upon the *conclusion* (R. 25) that a wife who has lived with another man, after her husband’s desertion, cannot be said to be living apart from her husband for justifiable cause or by reason of his desertion at the time of his death.

An analysis of the two prior decisions of the Fifth Circuit Court of Appeals cited by the Court below indicates that in each case the issue of the wife’s behavior, after separation, was treated as one of law.

In *American Mutual Liability Insurance Co. v. Henderson*, 141 F. 2d 813, the Deputy Commissioner had made an award to a wife, who after desertion by her husband, lived with and bore children of another man. The Fifth Circuit reversed the award without regard to the findings of the Deputy Commissioner and ruled:

“As this court held in the recent case of *Ryan Stevedoring Company v. Henderson*, 5 Cir. 138 F. 2d 348, this new and independent reason for her living apart from her husband operated *as a matter of law* to forfeit any and all rights of the wife as a claimant of compensation under the Act.” (p. 814, italics added.)

In the cited case, on similar facts, and again without regard to the findings of fact, the Fifth Circuit reversed

a compensation order by the Deputy Commissioner because it "was not in accordance with law." (Page 349.)

In *Travelers Insurance Company v. Norton*, 34 F. Supp. 740, D. C. E. D. Pa. 1940, the findings of fact contained no reference to the post-separation conduct of the wife. The plaintiff, on the basis of a stipulation as to the facts, sought reversal of the Deputy Commissioner's award as contrary to law. What is relevant here is that the District Court denied the plaintiff relief not upon the issue of the sufficiency of the evidence, but because "to read such a provision (barring recovery by the wife) into an unambiguous statute would exceed the proper bounds of the judicial function". (Page 742.)

Similarly in *Associated Operating Company v. Lowe*, 52 F. Supp. 550, aff'd per curiam 138 F. 2d 916, C. A. 2, 1943, the plaintiff sought to reverse an award by the Deputy Commissioner as being an erroneous finding of law. The opinion of the Court, although it termed the findings in the award as findings of fact and upheld the award, rejected the plaintiff's position upon the basis of its interpretation of the statute; namely, "I can find no authority for adding to the Statute provisions which are not even by fair inference to be found in it." (Page 553.)

In *Moore Dry Dock v. Pillsbury*, 169 F. 2d 988, C. A. 9, 19—, the Court stated:

"The compensation order did not make or contain any finding. Findings made by the Deputy Commissioner preceded the compensation order. There was no finding that claimant was a legal dependent upon decedent on May 12, 1945. There was what purported to be a finding, but actually was a conclusion of law, that claimant was entitled to a death benefit. The conclusion was correct; for, as stated above, claimant was decedent's widow."

The Ninth Circuit, as have the other Courts which have been confronted with the issue, regarded the question as one of statutory construction, holding in reply to the appellant's contention that the award was not in accordance with law, that "The Act does not provide that an employee's widow who, while married to such employee, went through a marriage ceremony with another man . . . shall not be entitled to a death benefit. Such a provision should not be read into the Act by judicial construction (pp. 990-991).

In none of the decisions, therefore, does it appear that the issue before this Court has been regarded as a finding of fact reviewable only for the sufficiency of evidence behind it. In each of the cases, the Courts, whether granting an award to the wife or denying it, have done so upon their interpretation of the statute.

Having thus misconceived the issue, it is understandable that the respondents here have themselves confused appearance with reality in stating that there is no conflict among the circuits. The best authority on the question obviously is the courts. The Fifth Circuit stated of the decisions in the Second, Third and Ninth Circuits: "We think they proceed upon a completely false premise"; while the Ninth Circuit said of the decisions in the Fifth Circuit: "To the extent that these decisions support appellant's contention, we deem them erroneous and decline to follow them". A more explicit statement of disagreement among the judicial circuits, we suggest, cannot be uttered.

To support their position, respondents suggest that the Deputy Commissioner's conclusion that petitioner was not living apart from decedent for justifiable cause or by reason of his desertion was based on the fact that on June 7, 1951, some 25 years after the desertion, Otis Thompson asked Julia Thompson if she would take him back and Julia

Thompson refused. As the supplemental memorandum for the respondent Deputy Commissioner suggests (p. 3) there is nothing in the record whatever to indicate that the Deputy Commissioner based his denial of the petitioner's claim for benefits upon this refusal in 1951. Directly to the contrary, the record shows that the Deputy Commissioner in his findings adopted the date of the petitioner's bigamous marriage ceremony in 1940 as the terminal date of her separation from her husband for justifiable cause or by reason of his desertion (R. 8), rendering the 1951 occurrence immaterial as far as the findings are concerned.

The makeweight ground added by the lower court for affirming the judgment below, to-wit, the negative answer to decedent's inquiry in 1951, is equally a question of law. It poses in substance the identical issue as petitioner's bigamous marriage after the desertion. Respondents themselves suggest (Brief in Opposition, p. 8) that the question for determination is whether the intervening acts of the wife after her husband's desertion altered her status as a wife living apart for justifiable cause or by reason of desertion. Intervening acts might be a bigamous marriage or other acts of immorality or a refusal by the wife to return to her husband or a negative answer to a question whether she would return.

Whether legal effect can be given to any intervening act must necessarily pose a question of law. For the issue, in any case, is whether the Statute permits the Deputy Commissioner to inquire into the conduct of the wife when she is living apart by reason of desertion or for justifiable cause.

Applicability of the Local Law of Divorce

In the view that the petitioner takes of the case, it is immaterial whether the law of Florida, or of a particular state be applied to the issue of the wife's refusal to re-

spond affirmatively to the question "Would she take him (her husband) back". It is patent that under the law of no State would a wife who had been deserted for 25 years and whose husband, prior to the desertion had begun an adulterous relationship which continued until his death, would lose her status as one living apart for justifiable cause or by reason of desertion merely because of her refusal under those circumstances to respond affirmatively to such an inquiry by her husband.

Conclusion

The pivotal issue in this case remains the construction to be given to the Longshoremen's and Harbor Workers' Compensation Act. Whatever may be said about the decision below, it must be conceded that the ruling is in conflict with the decisions of three other judicial circuits. In view of the importance of the issue in the administration of the statute, petitioner suggests that the original decision of this Court in granting a writ of certiorari was correct.

Respectfully submitted,

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